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Proposals and contributions received from Governments

Indonesia: non-paper on the United Nations Convention against Corruption

1. Corruption is the greatest threat to democracy, a cause of misallocation of resources and an obstacle to economic development. It is not merely a local, domestic problem but has instead a strong transnational dimension. For this reason, international cooperation is necessary to fight corruption. The United Nations Convention against Corruption must therefore provide for specific measures that make possible and indeed encourage international cooperation.

2. It is important that the convention cover (a) prevention; (b) criminalization and law enforcement; and (c) international cooperation. As indicated in the draft resolution adopted by the Commission on Crime Prevention and Criminal Justice at its reconvened thirty-fourth session,[1] a "multidisciplinary approach" should be the guiding principle of the convention. For this reason, none of these three aspects of the convention should be neglected in the fight against corruption.

3. The convention should provide for international cooperation and an effective framework to strengthen each State's capacity to fight against corruption, bearing in mind the importance not only of good governance but also of good corporate culture in the fight against corruption. Since differences in countries' legal systems and cultures could make the latter concept a difficult issue, it should be considered whether to include a definition of good corporate culture and related goals and minimum standards in an annex to the convention rather than in the text of the convention itself. Such an annex should extend the multidisciplinary approach also to areas such as the raising of public awareness, institution-building and standards and methods for monitoring anti-corruption policies.

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I. Prevention

4. Preventive measures are an important element of the convention and the desired multidisciplinary approach to the complex problem of corruption. To achieve maximum effectiveness, any such measures should take into consideration the differences between the legal and administrative systems of States.

5. In addition, when considering preventive measures, it is important that both good governance and good corporate culture are encouraged in order to attack multiple facets of the problem of corruption.

6. Important points to be addressed by the convention in this connection are indicated below.

Management of non-elected public officials

7. Although the public service personnel system varies between countries, it must be possible in the convention to establish minimum standards of good governance, including conduct, recruitment, employment and transparency, while at the same time permitting States parties to implement those standards in accordance with their own legal and administrative systems. Such standards could include measures to encourage merit-based hiring and promotion, objective standards for dismissal and adequate working conditions and remuneration, as well as requirements for officials to disclose their income, assets and debts, as a way to achieve improved transparency and avoid conflicts of interest.

8. An effective response to a multifaceted problem such as corruption, which often involves a dynamic relationship between public and private entities, cannot itself be one-sided. In addition to good governance, it must also be possible to address corruption by establishing minimum standards of good corporate culture, including proper management and transparency of legal persons.

9. In this connection, measures could include establishment of a public record of legal and natural persons involved in the establishment, management and funding of legal persons; establishment of proper standards for disqualification of directors of legal persons; establishment of measures to make possible and ensure external inspection, including establishment of the obligation to maintain accounting books and application of proper and adequate sanctions against their falsification and intentional omissions; and development of proper codes of conduct for attorneys, notaries and accountants (see art. 31 of the United Nations Convention against Transnational Organized Crime (the "Organized Crime Convention", General Assembly resolution 55/25, annex I)).

Government procurement and subsidies

10. The convention could introduce measures to address the issues of transparency and fairness in government procurement, subsidies, authorization and approval.

Disclosure of information

11. A system of disclosure of information in both the public and private sectors could be established in such a way that it does not endanger the States' integrity and

sovereignty, as this would contribute to transparency and thus to the prevention of corruption.

Public awareness

12. Since cultural and systemic differences between States can make uniform measures against corruption difficult to establish and implement and since public awareness of the nature of the problem of corruption can vary widely, the convention could also include measures to promote public awareness of the forms of corruption, its costs to society and methods of prevention. It is important to reduce the cultural permissiveness of corruption and to develop, where necessary, integrity and civic morality. At the same time, this cannot be done without transparency and providing the public with the necessary information or without appropriate legal protection, such as laws to protect "whistle-blowers". However, the convention should go beyond the mere recommendation of raising public awareness and give indications as to how to actively involve civil society at large and the victims of corruption in particular in the fight against corruption, as well as transnational corporations. The ultimate goal must be a true partnership rather than an increasingly disillusioned public.

Judicial and law enforcement agencies

13. The convention could introduce measures to ensure an independent yet accountable judiciary and fair and impartial law enforcement agencies. The institutions of the criminal justice system, as the ultimate guardians of national integrity, must be protected from corrupt practices. Integrity testing and an increasingly active involvement of civil society in the direct oversight of those institutions are measures that in some countries have proved extremely effective.

II. Criminalization and law enforcement

Basic principles

14. Since the primary objective of the convention is to protect and enhance the integrity of democratic governance as well as avoid the misuse and misallocation of public funds and resources, it should also focus on the most basic and fundamental type of corruption, namely, forms of bribery involving public officials, both domestic and foreign.

15. However, the multifaceted nature of the problem of corruption should be taken into consideration and it is also necessary for the focus of the convention to go beyond bribery and cover other forms of corruption as well, including embezzlement and misappropriation of public funds, favoritism, nepotism and the illegal financing of political parties. In addition, legislation should address both good governance and good corporate culture and laws criminalizing bribery of public officials and other forms of corruption should take this into account.

Definition of bribery

16. In order to avoid unnecessary confusion, article 8, paragraph 1, of the Organized Crime Convention could be used to define bribery.

"(a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

"(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties"

and the definition of "public official" should follow the example of paragraph 4 of that article:

"4. For the purposes of paragraph 1 of this article and article 9 of this Convention, 'public official' shall mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function."

Criminalization of bribery

17. Given the international nature of corruption and bribery and to simplify international cooperation in the fight against corruption, the convention should also provide for measures to assist States to criminalize bribery, both active and passive, involving officials working in international organizations, political parties and the private sector.

18. While the structure and legal status of political parties and their social and political influence may differ greatly from country to country, the question of bribery involving officials of political parties is of importance, especially to the extent that such officials have the capacity to influence the decisions and actions of public officials. While the issue of whether this exceeds the scope of the convention merits further discussion, if it is seen to fall under the scope of the convention, then the convention could also incorporate measures to cover this problem.

19. Private entities that provide public services but belong to the "private sector" category can be addressed by defining "public officials" to include them (following the example of article 8, paragraph 4, of the Organized Crime Convention).

20. Although the main target of the convention is corruption in the public sector, inclusion of the private sector is warranted given the multifaceted nature of such corruption and the interaction of the two sectors, whereby good governance and good corporate culture are interrelated.

Corruption other than bribery

21. Although the legal interest protected in cases of corruption involving bribery can be considered to be public integrity and in other corruption cases, such as embezzlement, misappropriation and breach of trust, it can be considered to be property rights, at the most fundamental level the damages caused by corruption are a result of misallocation of public resources. For this reason and because the multifaceted and interrelated nature of crimes of corruption makes it impossible to separate these classes of crime entirely, it would not be inappropriate for the convention to take into consideration crimes of corruption other than bribery.

Return of funds of illicit origin derived from corruption

22. One of the most difficult issues in connection with the fight against corruption is also one of the most crucially important, namely, how to resolve the complex issues connected with the return of funds of illicit origin derived from corruption. While concerns such as legitimate property right issues and the interests of bona fide third parties should not be neglected, enabling the return or confiscation of proceeds of illicit origin derived from corruption is of great importance both in terms of prevention and to mitigate the damage corruption causes to society through the misallocation of public resources it occasions. Given the many sensitive issues involved, including state immunity and the need to create procedures to implement the return of such proceeds, it is essential that this question be considered. Measures in this context should include adequate criminal and administrative sanctioning of those legal and natural persons who facilitate the diversion of public funds, in particular in cases where they did not comply with the standards governing their professional domain.

23. In this connection, the concept of shifting burden of proof also merits consideration in order to find a way to employ this concept in corruption proceedings with a view to recovering funds of illegal origin without compromising fundamental legal protection such as the presumption of innocence.

Criminal procedures

24. In view of the difficulty of investigation and prosecution given the nature of bribery and other corruption-related offences, which are usually committed privately or secretly, since all the parties to the offence have equally strong motivations to keep them secret, the introduction of mitigation of punishment and/or immunity from prosecution in certain cases, such as for "whistle-blowers", could be considered.

25. The future instrument could also devise new means of overcoming the secrecy of corruption by increasing the significance of circumstantial evidence indicating some source of illicit income of a public official. Criminal and/or administrative sanctioning of the possession of unexplained wealth is only one option that could be taken into consideration. Another possibility consists of developing measures to deprive the public official of his or her inexplicable wealth if he or she maintains a standard of living or is in control or possession of financial resources or property disproportionate to his or her present or past known sources of income and fails to give a satisfactory explanation in that regard. Finally, it may also very well prove necessary to rethink the concept of "penalty" as such and to start to rely more heavily on "property penalties" for certain types of crime rather than on imprisonment, or a combination of both.

III. International cooperation

26. Given the multifaceted and increasingly international nature of the corruption problem, it is important that international cooperation and related issues such as exchange of information, the freezing, confiscation and return of funds that are the proceeds of illegal activities or that have been illegally transferred, extradition of suspects, assistance to developing countries, cooperation with relevant international

organizations, implementation of the future instrument and its monitoring be considered.

IV. Monitoring

27. The convention should devise a system of impact-oriented self- and/or mutual evaluation of anti-corruption policies. The convention could also promote the use of a regular assessment of objective indicators of vulnerability to misconduct, including corrupt practices.

Notes

[1] See *Official Records of the Economic and Social Council, 2001, Supplement No. 10* (E/2001/30/Rev.1), part two, chap. I, sect. A, para. 1.